

**COMMONWEALTH OF KENTUCKY
BULLITT CIRCUIT COURT
DIVISION I
CIVIL ACTION No. 19-CI-00762**

LOUISVILLE GAS AND ELECTRIC COMPANY

PLAINTIFF

**DEFENDANT KENTUCKY HERITAGE LAND
vs. CONSERVATION FUND BOARD'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO DISMISS WITH PREJUDICE**

ISAAC W. BERNHEIM FOUNDATION, *et al.*

DEFENDANTS

Electronically Filed

* * * * *

STATEMENTS OF FACT

1. The Defendant, Kentucky Heritage Land Conservation Fund Board (“KHLCF Board”), is a public agency of the Commonwealth of Kentucky, as enacted by General Assembly in KRS 146.560(1).

2. The KHLCF Board administers the Kentucky Heritage Land Conservation Fund. The KHLCF Board reviews grant requests from other agencies and private, nonprofit land trust organizations for the purchase of natural areas that (1) possess unique features such as habitat for rare and endangered species; (2) are important to migratory birds; (3) perform important natural functions that are subject to alteration or loss; or (4) are to be preserved in their natural state for public use, outdoor recreation, and education. KRS 146.560(2)(a-d).

3. The KHLCF Board is the holder of a conservation easement that encumbers approximately four hundred ninety-four and thirty-three tenths (494.33) acres of land in Bullitt County, Kentucky (“Simon Tract”) that are owned by the Defendant, Isaac W.

Bernheim Foundation (“Bernheim”). The Conservation Easement is recorded in Deed Book 956, Page 615 in the Office of the Bullitt County Clerk (“Conservation Easement”). A true and accurate copy of the Conservation Easement is attached hereto and incorporated herein as Exhibit A.

4. In exchange for the Conservation Easement, the KHLCF Board paid Bernheim approximately half of the cost of the purchase price of the Simon Tract, or seven hundred six thousand, five hundred dollars, and zero cents (\$706,500.00). Exhibit A.

5. Bernheim purchased the Simon Tract on October 15, 2018. The General Warranty Deeds transferring the Simon Tract to Bernheim are on record with the Office of the Bullitt County Clerk in Deed Book 956, Page 600, and Deed Book 956, Page 606. True and accurate copies of the Deeds are attached hereto and incorporated herein respectively as Exhibits B and C.

6. Bernheim and the KHLCF Board executed the Conservation Easement on October 15, 2018. Exhibit A.

7. On or about the morning of January 22, 2019, Cheryl Bruner, a representative for the Plaintiff, Louisville Gas and Electricity Company (“LG&E”), contacted the Chairman of the KHLCF Board, Zeb Weese. Ms. Bruner followed up from the phone call with an email sent later that day. A true and accurate copy of the email thread containing the email sent from Cheryl Bruner, Director, Operating Services & Corporate Security for LG&E to Jason L. “Zeb” Weese, Chairman of the KHLCF on January 22, 2019 is attached hereto and incorporated herein as Exhibit D.

8. In the email, Ms. Bruner explained to Mr. Weese that “LG&E would like the KHLCF Board and the Bernheim Foundation to agree to allow LG&E to purchase a

pipeline easement.” She further requested a meeting with representatives of the KHLCF Board and Bernheim. Prior to this conservation, the KHLCF Board had no knowledge of LG&E’s intent to install a pipeline on the Simon Tract. Exhibit C; Affidavit of Zeb Weese attached hereto and incorporated herein as Exhibit E.

9. Mr. Weese responded to the email two days later explaining that the KHLCF Board Stewardship Committee would contact Bernheim to discuss the matter before responding to LG&E. Exhibit D, email sent from Mr. Weese to Ms. Bruner on January 24, 2019.

10. On February 28, 2019, Ms. Bruner sent another email to Mr. Weese to determine if any progress had been made with the Stewardship Committee. Exhibit D, email sent from Ms. Bruner to Mr. Weese on February 28, 2019.

11. Several days later on March 3, Mr. Weese responded that “[t]he KHLCF [Board] has discussed the issues and determined that it will take no position or action unless requested to do so by the Bernheim Board as the easement grantor. If Mark [Wourms, Director of Bernheim] or the Bernheim Board requests a meeting, we will be glad to attend.” Exhibit D, email sent from Mr. Weese to Ms. Bruner on March 3, 2019 at 3:52 p.m.

12. Ms. Bruner responded a few hours later indicating that she would contact Mr. Wourms. Exhibit D, email sent by Ms. Bruner to Mr. Weese on March 3, 2019 at 8:25 p.m.

13. On March 18, 2019, Ms. Bruner sent a letter to Mr. Wourms on which she copied Mr. Weese stating her desire to follow up from previous communications with Bernheim and the KHLCF Board. A true and accurate copy of the letter sent by Ms. Bruner

to Mr. Wourms on March 18, 2019 with enclosures is attached hereto and incorporated herein as Exhibit F.

14. Several weeks later on April 8, Ms. Bruner sent another letter to Mr. Wourms on which Mr. Weese was again copied, and in which she expressed her desire to meet with Bernheim and the KHLCF Board. The letter contained a proposed easement for the pipeline and a survey of the proposed path of the pipeline. A true and accurate copy of the letter with enclosures sent by Ms. Bruner to Mr. Wourms on April 8, 2019 is attached hereto and incorporated herein as Exhibit G.

15. Ms. Bruner also sent her letter of April 8 via email to both Mr. Wourms and Mr. Weese the same day at 4:40 p.m. Mr. Wourms responded at 10:29 p.m. by stating that he would discuss the matter with Bernheim's Capital Asset Committee. Mr. Weese responded the following morning on April 9 stating that the KHLCF Board would contact LG&E if it received any correspondence from Bernheim concerning the pipeline. A true and accurate copy of the email thread containing messages exchanged among Mr. Wourms, Ms. Bruner, and Mr. Weese on April 8 and 9, 2019 is attached hereto and incorporated herein as Exhibit H.

16. On July 31, 2019, LG&E initiated this condemnation action. The Bullitt County Circuit Clerk served summons on the Petition to the KHLCF Board via the Office of the Attorney General on October 7, 2019.

17. Prior to the service of Summons, the KHLCF Board did not receive any further communications from LG&E following Ms. Bruner's email and letter of April 8, 2019. The KHLCF Board did not receive an offer for its interest in the portion of the Simon

Tract over which LG&E sought to purchase an easement. Affidavit of Zeb Weese, Exhibit E.

LEGAL ANALYSIS

A. *Standard of Review.*

This matter arises under the Kentucky Eminent Domain Act KRS 416.540 *et seq.* (“Act”). The proceedings for a matter brought under the Act are to be governed by the Kentucky Rules of Civil Procedure (“CR”) except where the provisions of the Act “specifically or by necessary implication provide otherwise.” KRS 416.650.

A defendant in a condemnation proceeding has the right to file an “answer *or other pleading*” in response to the summons which “shall be confined solely to the question of the right of the condemnor to condemn the property sought to be condemned.” KRS 416.600. The KHLCF Board’s Motion to Dismiss is an “other pleading” as contemplated by the General Assembly in KRS 416.600 and is brought pursuant to CR 12.02 as allowed for under KRS 416.600. More specifically, the KHLCF Board moves the Court to dismiss the petition with prejudice for lack of jurisdiction over the subject matter of this action due to LG&E’s failure to tender an offer to the KHLCF Board for its interest in the Simon Tract prior to seeking condemnation. KRS 416.550; KRS 278.502.

Subject-matter jurisdiction refers to the authority of a court to hear a “kind” of case. *Davis v. Wingate*, 437 S.W.3d 720, 725 (Ky. 2014). As the Supreme Court has held, “[a] court acts outside its jurisdiction . . . only ‘where [it] has not been given, by constitutional provision or statute, the power to do anything at all.’” *Davis*, 437 S.W.3d at 725 (Ky. 2014) (quoting *Daugherty v. Telek*, 366 S.W.3d 463, 467 (Ky. 2012)). Indeed, “[w]here the conditions for the exercise of power by a court are not met, the judicial power is not

lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.” *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978).

B. LG&E’s Petition Should be Dismissed with Prejudice for LG&E’s Failure to Tender an Offer to the KHLCF Board Prior to Initiating this Action.

LG&E’s Petition should be dismissed with prejudice due to LG&E’s failure to tender an offer to the KHLCF Board for its interest in the portion of the Simon Tract over which LG&E seeks an easement. An offer is a condition precedent to initiating a condemnation action, the absence of which bars LG&E from seeking to condemn the pipeline easement. The KHLCF Board did not at any time refuse to negotiate or entertain offers from LG&E. The KHLCF Board received LG&E’s communications, acknowledged receipt, and repeatedly indicated to LG&E its desire to await further instruction from Bernheim, the easement grantor, prior to meeting with LG&E. After responding to LG&E’s letter of April 8, 2019, the next communication from LG&E was service of process. At no time prior to the initiation of this action did LG&E ever tender an offer to the KHLCF Board as compensation for the inevitable harm that the installation of a pipeline would bring to its valuable interest in the Simon Tract.

The Kentucky Eminent Domain Act (“Act”) provides that a condemnor may only condemn . . . property, property rights, privileges, or easements” if it “cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is authorized by law, to exercise its right of eminent domain” KRS 416.550. Public utilities such as LG&E may only seek to condemn lands if they are “unable to contract or agree with the owner after a *good faith effort* to do so” KRS 278.502 (Emphasis added). Kentucky Courts evaluate the

sufficiency of the condemnor’s attempt to “agree” with the property owner by determining “whether the condemnor made a reasonable effort in good faith to acquire the land by private sale at a reasonable price. The statute implicitly requires an effort to effect a contract of purchase satisfactory to the condemnor.” *Usher & Gardner, Inc. v. Mayfield Independent Board of Education*, 461 S.W.2d 560, 562, 563 (Ky. 1970).

The KHLCF Board clearly holds a valuable interest in the Simon Tract. The KHLCF Board paid Bernheim \$706,500.00 – half the purchase price of the Simon Tract – in exchange for the Conservation Easement. A conservation easement is defined in KRS 382.800(1) to mean “a nonpossessory interest of a holder in real property. . . .”¹ The Kentucky Eminent Domain Act defines property to mean “real or personal property, or both, *of any nature or kind* that is subject to condemnation.” KRS 416.540(8). Clearly a conservation easement is a “nature or kind” of real property. Since the KHLCF Board held a valuable interest in the Simon Tract, it had the right to receive an offer made in good faith from LG&E prior to the initiation of this action.

The harm caused by the proposed pipeline project is not distinct from the value contained in the Conservation Easement. This case is unlike the matter decided in *Crain v. Hardin County Water District No. 2* where the Kentucky Department of Agriculture, Purchase of Agriculture Conservation Easement Corporation (“PACE Corporation”) took no position on the water district’s condemnation of the respondents’ property despite holding an agricultural easement over the subject property. *Crain v. Hardin County Water*

¹ The remainder of the definition of “conservation easement” provides “. . . imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.”

District No. 2, No. 2015-CA-000499-MR, 2016 WL 3453206, p. 2 (Ky. Ct. App. June 17, 2016).² An agricultural conservation easement is defined as “an interest in land, less than fee simple, which represents the right to restrict or prevent the development or improvement of the land for purposes *other than agricultural production*.” KRS 262.900(1). (Emphasis added). Unlike land held under a conservation easement, land held under an agricultural easement can be developed, but only for agricultural purposes. In *Crain*, the water district sought to place a water line underground on the respondents’ property – no above-ground facilities would be installed. *Id.* at 2. The PACE Corporation did not require compensation because the proposed project would not interfere or harm its interest in the land, that is, the value of the agricultural easement.³ The installation of an underground water line would not preclude the use of the land for agricultural purposes which the easement was intended to guarantee.

Compensation – and by implication, an offer – is required, however, where the proposed condemnation *would* harm the value in the held easement. In the case at bar, the value of the Conservation Easement lies in its power to prohibit *any* further development of the Simon Tract that would be inconsistent with the conservation values set forth by the General Assembly in KRS 146.550 *et seq.* and KRS 382.800 *et seq.* In consideration of the conservation value contained in the Simon Tract, the KHLCF Board paid Bernheim \$706,500.00, or half of the amount of the purchase price for the Simon Tract. Yet, LG&E never tendered an offer to the KHLCF Board to compensate it for the inevitable loss of value in the portion of the Simon Tract that would result from the installation of a pipeline.

² This is an unpublished case of the Court of Appeals. A copy of the Opinion is attached hereto and incorporated herein as Exhibit I.

³ While not stated in the unpublished opinion, a true and accurate copy of the Pace Corporation’s Answer in the Hardin County Circuit Court case is attached hereto and incorporated herein as Exhibit J.

LG&E cannot claim that its failure to tender an offer to the KHLCF Board was due to a refusal by the Board to negotiate for the installation of a pipeline; quite the opposite, the Board never refused to negotiate with LG&E. A landowner's refusal to negotiate with a purchaser prior to condemnation proceedings may not be evidence of the condemnor's own failure to negotiate in good faith. In *Porter v. Shelbyville Cemetery Company*, the cemetery company sought to purchase an undeveloped, thirteen-acre tract of land from the original owner who had announced that he was accepting offers for the property. *Porter v. Shelbyville Cemetery Company*, No. 2007-CA-002390-MR, 2008 WL 4822525, at p. 1 (Ky. Ct. App. Nov. 7, 2008).⁴ Shortly thereafter, the original owner notified the cemetery company that he had found purchasers. *Id.* Prior to closing, the cemetery company sent a letter to the purchasers informing them that it was "interested in acquiring the [property] by any means necessary." *Id.* at 2.⁵ The purchasers' attorney responded to the cemetery company, stating that they "[had] an executed contract for the purchase of the [property] and *it is not for sale.*" *Id.* (Emphasis added). A month later, and still before closing, the cemetery company sent another letter to the purchasers requesting a meeting to discuss a resolution to the matter. *Id.* A week later, the purchasers closed on the property, and not long after, the cemetery company initiated a condemnation action. *Id.*⁶

⁴ The opinion in this matter is an unpublished Opinion of the Court of Appeals and is therefore attached hereto as Exhibit K.

⁵ While not directly on point with the present argument of the KHLCF Board, it is worth noting that the purchasers were not unaware of the cemetery company's interest in the property. *Porter*, at 1. The purchasers were already the owners and residents of property located directly across from the entrance to the cemetery, and one of the purchasers sat on the board of the cemetery company until the point of the conflict. *Id.* Thus, the purchasers in *Porter* should not have been surprised by the cemetery company's interest in the property. In the case at bar, the KHLCF Board was entirely unaware of LG&E's desire to install a pipeline on the Simon Tract until several months *after* the deeds and the Conservation Easement has been executed and recorded.

⁶ The Court of Appeals later noted that the purchasers responded to the cemetery company's second request by reiterating that the property was "not for sale." *Id.* at 4.

The purchasers moved to dismiss the petition arguing in part that the cemetery company had failed to negotiate in good faith. *Id.* The circuit court overruled the motion, and the purchasers appealed, arguing more specifically that the cemetery company did not negotiate in good faith because it never tendered a monetary offer. *Id.* at 2, 4. The Court of Appeals rejected this argument because it found that the purchasers’ attorney had rebuffed the cemetery company on at least two occasions, informing it that the property was “not for sale” despite the cemetery company’s repeated requests to negotiate. *Id.* at 4.

No such rebuff was ever made by the KHLCF Board to LG&E. The KHLCF Board, through its chair, Zeb Weese, first became aware of LG&E’s desire to install a pipeline over the Simon Tract when he received a phone call from Cheryl Bruner, a representative for LG&E, on January 22, 2019. She followed up her phone call with an email later that day requesting a meeting with representatives of the KHLCF Board and Bernheim. Mr. Weese responded, informing her that the KHLCF Board’s Stewardship Committee would contact Bernheim to discuss the matter prior to issuing a more formal response. A month later, Ms. Bruner followed up with Mr. Weese requesting an update on the progress of discussions between the Stewardship Committee and Bernheim. Mr. Weese responded that “[t]he KHLCF [had] discussed this issue and determined that it will take no position or action unless requested to do so by the Bernheim Board as the easement grantor. If Mark [Wourms, Executive Director of Bernheim] or the Bernheim Board requests a meeting we will be glad to attend.” Ms. Bruner acknowledged Mr. Weese’s response and informed him that she would contact Mr. Wourms. Ms. Bruner then sent Mr. Wourms two letters – one on March 18, 2019, and another on April 8, 2019 – and on which she copied Mr. Weese. In both letters, she requested to meet with Bernheim and the KHLCF Board. On April 8,

she sent an email containing both letters to Mark Wourms, Executive Director of Bernheim, and Mr. Weese. Mr. Wourms responded first by email stating that he “will discuss this with Bernheim’s Capital Asset Committee next week and reply shortly thereafter.” Mr. Weese then responded that “[t]he KHLCF Board will respond as soon as possible if it receives any correspondence from the Bernheim Board regarding the Simon Tract.” The next communication from LG&E to the KHLCF Board arrived six months later on October 7 in the form of service of process on the Petition.

Like the cemetery company in *Porter*, LG&E never made the KHLCF Board a monetary offer. However, *unlike* the purchasers in *Porter*, the KHLCF Board never rebuffed LG&E. The KHLCF Board never refused to negotiate with LG&E; it simply stated it could not unilaterally negotiate with LG&E absent Bernheim, and that as the easement grantor, it would wait to hear from Bernheim on the matter. To the extent that Bernheim and LG&E engaged in subsequent negotiations, or discussed any monetary offers, LG&E did not include the KHLCF Board in those negotiations or tender the same offers to the KHLCF Board. Since the KHLCF Board has an interest in the subject property – namely, the Conservation Easement – for which it paid \$706,500.00, LG&E had an obligation to attempt to agree with the KHLCF Board as the holder of the Conservation Easement, not just the holder of the fee estate. KRS 416.550; KRS 278.502. Implicit in an attempt to agree is “an effort to effect a contract of purchase.” *Usher & Gardner, Inc.*, 461 S.W.2d at 562, 563. That means an offer, one which the KHLCF Board never received through no fault of its own.

CONCLUSION

Kentucky law requires a condemnor to attempt to agree to the purchase of property prior to initiating condemnation proceedings. At a minimum, an attempt to agree requires “a reasonable effort in good faith to acquire the land by private sale at a reasonable price.” *Usher & Gardner, Inc.*, 461 S.W.2d at 562, 563. In this case, LG&E was required to make the KHLCF Board an offer for its interest in the Simon Tract prior to initiating this action. It did not. At no point in its communications with LG&E did the KHLCF Board ever rebuff LG&E’s attempt to negotiate for the purchase of the pipeline easement. Instead, the KHLCF Board maintained that it needed to hear from Bernheim before it could respond to LG&E. To the extent that LG&E tendered an offer to Bernheim, it did not tender a like offer to the KHLCF Board for it to consider.

WHEREFORE, the Defendant, KHLCF Board, respectfully requests that this Court **GRANT** its Motion to Dismiss with Prejudice.

Respectfully submitted,

KENTUCKY HERITAGE LAND
CONSERVATION FUND BOARD

/s/ Timothy J. Mayer

Timothy J. Mayer, KBA No. 96793

Energy and Environment Cabinet

Office of Legal Services

300 Sower Blvd., Third Floor

Frankfort, Kentucky 40601

Phone: (502) 782-8639

Fax: (502) 564-7484

timothy.mayer@ky.gov

Counsel for the KHLCF Board